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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of the)
Commission's Rules to)
Establish New Personal)
Communications)
Services)

GEN Docket No. 90-314
RM-7140, RM-7175
RM-7618

JUL 25 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RECONSIDERATION

Comcast Corporation ("Comcast"), by its attorneys, hereby submits its Petition for Reconsideration ("Petition") of the Federal Communications Commission's (the "Commission") Memorandum Opinion and Order, adopted on June 9, 1994 in the PCS rulemaking proceeding.^{1/} Comcast requests reconsideration of certain aspects of the Order which, if unremedied, will hinder the development of Personal Communications Services ("PCS"). Specifically, the Commission should (1) modify the attribution standards for PCS cross-ownership to reflect important differences between equity ownership and control; and (2) revise impracticable post-auction divestiture rules to provide adequate time to divest disqualifying interests for all prospective PCS licensees.

I. **THE COMMISSION MUST ADOPT A PCS ATTRIBUTION STANDARD THAT RECOGNIZES VITAL DIFFERENCES BETWEEN EQUITY OWNERSHIP AND CONTROL**

The Commission's PCS attribution standard is unduly restrictive and arbitrary in its application to entities that hold less than controlling interests in PCS licensees. Under current rules, PCS ownership interests of 5% or more are

^{1/} See Memorandum Report and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 (adopted June 13, 1994) (hereafter "Order").

attributed to the holder of the interest and included for purposes of determining compliance with the 40 MHz PCS spectrum cap. Further, in applying this rule, all equity ownership is considered in calculating percentages of attributable interest in a PCS licensee, including voting and non-voting stock and limited partnership interests.^{2/}

However, this rule ignores the fact that holders of minority interests greater than 5%, particularly in publicly traded corporations, pose no competitive threat to the PCS marketplace and create little potential for anti-competitive behavior. As such, the application of the strict 5% attribution standard, without reference to the nature of those interests, is flawed and is inconsistent with the policies supporting the cellular cross-ownership rule, the rules applied to designated entity broadband PCS participation and the rules governing indirect ownership in cellular and PCS licensees.

In order to address these shortcomings, the Commission should: (i) increase the attribution standard to 20%, provided that no more than a 5% voting interest is held; and (ii) increase the attribution standard to 25% in publicly traded corporations, provided that no more than 15% of the voting interests are held.

The Commission has already acknowledged, through its other findings and rules in this docket, that parties holding more than 5% of the equity of a third party may lack effective control of such third party or any incentive to act anti-competitively. For example:

- In establishing the 20% attribution standard for cellular/PCS cross-ownership, the Commission explicitly recognized that entities possessing non-

^{2/} See Order at ¶ 119.

controlling interests in cellular licensees, though perhaps holding more than 5% of the equity of the enterprise, possess little potential for anti-competitive behavior because of the non-controlling nature of their investment.^{3/} Accordingly, the Commission found a 20% attribution standard struck a more reasoned and proper balance between foreclosing investors with limited interests in cellular from participating in PCS and preventing cellular licensees from limiting the development of competitive mobile services.^{4/}

There is no difference whatsoever between an entity holding a 19.9% equity interest in a cellular licensee and an entity holding a 19.9% interest in a PCS licensee. Neither can be said to have control of the licensee, or a significant enough financial interest for the Commission to fear anti-competitive conduct; and if such can be said of the investor in the cellular licensee, it must also be said of the investor in the PCS licensee.

However, rather than upset the cellular/PCS cross-ownership rule to address this inconsistency, the Commission should apply that same logic in the context of the PCS attribution rule. Indeed, Comcast's proposals permit application of that same logic, while taking into account the Commission's concerns with respect to actual control. They are also consistent with the Commission's designated entities policies.

- The 5% attribution rule as applied to holders of non-controlling interests is in stark contrast to the Commission's rules governing designated entity participation in broadband PCS, specifically the treatment of non-controlling

3/ See Order at ¶ 105.

4/ Ironically, the Commission has concluded that non-controlling interests become questionable only when they rise to a level greater than 20%. See Order at ¶ 113.

interests by cellular and PCS licensees. In its service-specific broadband PCS rules, for example, the Commission recognized that non-controlling interests should be treated differently than sizable equity interests that imply control. Specifically, the rules provide an exception to the 5% attribution rule for women and minority-owned "entrepreneurs" by determining that the gross revenues, assets or net worth of any single investor in a minority or women-owned applicant would not be attributable to the applicant unless the investor owns more than 49.9% of the passive equity of the applicant (which is defined to include as much as 5% of a corporation's voting stock).^{5/} Moreover, even if the qualified entrepreneur is not a woman or minority-controlled entity, the gross assets, personal net worth and affiliations of an investor in a PCS applicant are not attributed so long as the investor holds less than 25% of the applicant's passive equity.

Similarly, the Commission has adopted a relaxed attribution standard for "entrepreneurial" publicly traded companies. For these publicly traded companies, the Commission will not attribute the gross revenues or total assets of a shareholder, for purposes of determining eligibility to bid on the entrepreneurs' block, unless the entity owns up to 25% of the corporation's equity, even if that equity is represented by up to 15% of the voting stock.^{6/} This

^{5/} See Fifth Report and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253 (adopted June 29, 1994) (hereafter "Fifth Report"). In this context, the Commission protects against abuses by requiring the control group of the applicant to own at least 50.1% of the applicant's equity, as well as retain control and hold at least 50.1% of the voting stock.

^{6/} See Fifth Report at para. 163. To take advantage of this exception, the Commission also requires that the control group of the applicant control the corporation, hold at least 50.1% of the voting stock, and hold at least 25% of the company's equity.

accommodates the particular situation when a substantial minority shareholder might otherwise bar a company from participation in PCS.

These rules acknowledge two significant principles which are, inexplicably, not applied in the broader PCS context. First, there is a real difference between voting securities and passive investments. Second, due to the nature of investments in publicly traded corporations, higher attribution standards are appropriate. While Comcast acknowledges that the Commission adopted these principles in order to enhance access to capital, they are nonetheless equally true for non-entrepreneurs and may be applied in the context of PCS attribution without necessarily running afoul of the Commission's concerns regarding potential anti-competitive conduct.^{7/}

- Finally, just last week, and on its own motion, the Commission modified its attribution rules to incorporate a multiplier to determine PCS eligibility and participation if indirect ownership issues are involved.^{8/} In the Further Order, the Commission stated that the use of a multiplier was consistent with its policy goal of promoting full competition in wireless markets, because it

^{7/} The Commission must at least acknowledge that there are many publicly traded corporations that have shareholders holding more than 5% of the corporation's equity. No purpose is served in precluding these investors from participating in the PCS marketplace by virtue of their holdings. The fact that the minority investor has a financial stake in the company does not threaten competition if the investor can do nothing to accomplish an assumed anti-competitive goal. Most likely, these investors will not even be aware of the specific PCS strategies of the public companies in which they hold interests. In most circumstances they will not have any measure of control.

^{8/} See Further Order on Reconsideration, Amendment of the Commission's Rules to Establish New Personal Communications Services in the 2 GHz Band, GEN Docket No. 90-314 (adopted July 22, 1994) (hereafter "Further Order").

will not cause the exclusion of firms that pose no threat to competition.^{9/} The Commission also recognized that "considerations of 'actual involvement' with, true economic interest in, and ability to control a licensee are crucial in determining whether a particular indirect ownership interest should be attributed to the holder for purposes of the cross-ownership and multiple ownership rules."^{10/}

By focusing on "actual involvement" and the potential "threat to competition" the Commission was able to acknowledge that strict application of the 5% attribution standard would yield unacceptable results in the context of multi-tiered investments. Unfortunately, the Commission's analysis in support of the multiplier, as evidenced by the example used in the Further Order, is incomplete.^{11/}

In evaluating the effect of the multiplier upon Company A, the Commission suggests that it has provided relief to a company having "neither the ability to exert control or significant influence" over Company X by causing Company A to no longer to be viewed as a "cellular licensee." However, while no longer a "cellular licensee," Company A continues to have an attributable interest in all PCS activities of Company X. Therefore, if Company X acquires 40 MHz of PCS spectrum outside its cellular market, Company A will be precluded from doing so --- notwithstanding that the Commission has found that Company A lacks control, influence or significant financial interest in Company X. Perhaps most troubling is that Company A will more than likely have no exposure to Company X's PCS investment plans until the Commission notifies Company A that its

^{9/} See Further Order at ¶ 4.

^{10/} See Further Order at ¶ 5.

^{11/} See Further Order at ¶ 4.

application or winning bid has been disqualified, subjecting it to potentially substantial disqualification penalties.

In such a scenario, as in the context of a publicly traded corporation, there again is simply no rational explanation or empirical data that would suggest that the minority investor could delay the initiation of PCS service by that service provider, or reduce the competitive vigor of the PCS marketplace in that particular service area. Absolutely no purpose is served by denying markets of much needed funds on the basis of a competitive threat that does not exist. Adoption of Comcast's proposals would at least permit entities such as Company A an opportunity to independently participate in the PCS marketplace where it holds non-voting interests or if Company X is publicly traded.

II. **THE COMMISSION MUST MODIFY ITS POST-AUCTION
DIVESTITURE RULES TO PERMIT GREATER PCS
PARTICIPATION BY A WIDE VARIETY OF SERVICE
PROVIDERS.**

Pursuant to the Order, the Commission will permit post-auction divestiture of cellular interests for in-region cellular entities if their population coverage falls within a 10-20% population overlap.^{12/} Comcast submits that selection of the 20% figure is arbitrary and wholly fails to address the Commission-stated policies which allegedly support its adoption.

In promulgating this rule, the Commission placed great emphasis on the incentives of cellular operators with population overlaps of greater than 20% to stall the deployment of PCS. The Commission asserted that these cellular operators are incited to use the bidding process to delay the introduction of PCS

^{12/} See Order at ¶ 136.

because of their substantial cellular interests in the same market.^{13/} Conversely, for cellular operators with less than 20% population overlap, the Commission found little incentive to risk incurring penalties for abusing the bidding process when PCS offers greater potential to serve the entire MTA or BTA.^{14/}

Comcast submits that offering a divestiture option only to cellular licensees with a 20% or less overlap is indefensible. Since the divestiture option requires that cellular operators divest within a mandatory, limited time frame, it is irrelevant whether the cellular operator covers 6% of the PCS service area or 25% or 75%.^{15/} No greater opportunity to abuse the PCS bidding process exists for cellular operators that provide coverage above the established 20% threshold. Distinguishing the ability to participate on the grounds of population coverage above or below 20% is arbitrary and provides absolutely no additional safeguards from abuse.

Accordingly, Comcast urges the Commission to permit cellular entities to participate in the PCS auctions as long as they certify that they will come into complete compliance with the Commission's rules within an allotted post-auction time period. If the Commission is concerned about the divestiture of cellular interests covering greater than 20% of the PCS service area, Comcast recommends that the Commission adopt additional fines or specific license forfeiture rules with monetary penalties that would accommodate its concern without arbitrarily disqualifying a large number of entities from full PCS

^{13/} See Order at ¶ 143.

^{14/} Id.

^{15/} The Commission's Rules provide that all cellular entities, limited by the 10 MHz spectrum cap, divest themselves of disqualifying cellular holdings within 90 days of the PCS license grant. See Order at para. 145.

participation. Indeed, these rules would be more punitive to cellular licensees than an outright prohibition at the outset, and would better accomplish the Commission's goal of minimizing bad-faith bidding.

Even if the present divestiture requirement is unchanged, Comcast recommends that the Commission revise its 90-day divestiture requirement to reflect the actual ability of licensees to transfer licenses post-auction. Although Comcast does not believe that it is impossible to locate buyers within this time frame, accomplishing the transfer, including the negotiation, preparation, filing, processing and FCC approval and consummation within 90 days is impossible. Comcast submits that a rule requiring that divestiture occur within six months of the PCS license award is much more realistic in light of the preparation, negotiation and regulatory approval that would be required.

III. CONCLUSION

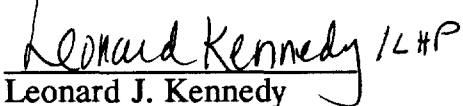
Comcast requests that the Commission revise its attribution standard to provide for greater non-controlling ownership in PCS licensees. The present standard ignores significant differences in ownership interests and unduly restricts participation in PCS even when no opportunity or threat of anti-competitive behavior exists. Comcast recommends that the Commission adopt (i) a 20% attribution test, with a 5% voting interest limit; and (ii) a similar standard for publicly traded companies as that established for entrepreneurs' block licenses. Specifically, Comcast urges the Commission to attribute only those interests in excess of 25% equity ownership in public corporations, even if the equity is represented by up to 15% of the voting stock.

Moreover, Comcast requests that all cellular entities be permitted to bid on PCS spectrum, subject to the condition that any disqualifying cellular

interests be divested within six months of the PCS license award. Any restriction on the availability of the divestiture option based on percentages of coverage is arbitrary and unfounded.

Respectfully submitted,

COMCAST CORPORATION

 /L#P
Leonard J. Kennedy
Richard S. Denning

DOW, LOHNES & ALBERTSON
1255 23rd Street. N.W.
Washington, D.C. 20037
(202) 857-2500

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